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No. 94-23

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U.S. DEPT. OF JUSTICE

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994.

CITY OF EDMONDS,
Petitioner,

v.

WASHINGTON STATE BUILDING CODE COUNCIL,
ET AL., AND UNITED STATES OF AMERICA,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE COMMON-
WEALTH OF MASSACHUSETTS AND THE
STATES OF ARIZONA, ARKANSAS, IDAHO, IOWA,
LOUISIANA, NEVADA, NEW MEXICO, TENNESSEE,
TEXAS, UTAH, WEST VIRGINIA, AND THE VIRGIN
ISLANDS IN SUPPORT OF RESPONDENTS

SCOTT HARRISBARGER
*Attorney General
of Massachusetts*

STANLEY J. EICHNER*
DONNA L. PALERMINO
LEO T. BOROKIN

Assistant Attorneys General
1 Ashburton Place, Room 1915
Boston, Massachusetts 02108
(617) 727-2300

*Counsel of Record

(Additional Counsel in Brief Court)

BEST AVAILABLE COPY

GRANT WOODS
*Attorney General
of Arizona*

WINSTON BRYANT
*Attorney General
of Arkansas*

ALAN G. LANCE
*Attorney General
of Idaho*

THOMAS J. MILLER
*Attorney General
of Iowa*

RICHARD P. IEYOUNG
*Attorney General
of Louisiana*

FRANKIE SUE DEL PAPA
*Attorney General
of Nevada*

TOM UDALL
*Attorney General
of New Mexico*

CHARLES W. BURSON
*Attorney General and
Reporter of Tennessee*

DAN MORALES
*Attorney General
of Texas*

JAN GRAHAM
*Attorney General
of Utah*

(Additional Counsel on Inside Back Cover)

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Statement of Interest

The *amici curiae* Commonwealth of Massachusetts and the States and Territory identified on the cover of this brief, through their attorneys general, submit this brief in support of Respondents, urging affirmance of the court of appeals.

Amici have two compelling interests that will be addressed in this brief and leave to the respondents a comprehensive analysis of the issues before this Court. First, as major providers of services to individuals with handicaps, including a continuum of residential settings, the *amici* have a substantial interest in the development of homes for these individuals. Resolution of this case affects the states' development of community residences for not only persons recovering from drug or alcohol abuse, but also persons with mental illness, mental retardation, Alzheimer's disease and other handicaps.¹ The Fair Housing Amendments Act of 1988 ("FHAA"), Pub. L. No. 100-430, 102 Stat. 1623, protects important rights and has been an integral part of the effort to open to persons with handicaps residential neighborhoods previously off-limits as a

¹ The FHAA defines "handicap" broadly to mean "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment, but . . . does not include current illegal use of or addiction to a controlled substance." 42 U.S.C. § 3602(h). This is the same three-part definition of handicap which Congress previously used in the Rehabilitation Act of 1973, 29 U.S.C. § 706(7)(6).

result of discriminatory land-use rules. Zoning definitions of family, such as the one enacted by Edmonds which limit the number of unrelated persons, but not the number of related persons who may occupy a dwelling, are prevalent throughout the United States and frequently invoked to prevent the establishment of community residences. Construing 42 U.S.C. § 3607(b)(1) to exempt these ordinances would allow all individuals with handicaps living in community residences to be excluded from single-family zones without any scrutiny under the FHAA and would impair state agencies' efforts to provide these homes.

Second, states have a substantial and longstanding interest in preventing dangerous overcrowding in dwellings and preserving the exemption from the FHAA for the public health restrictions that combat overcrowding. The states, or in some cases their municipalities pursuant to a grant of state authority, restrict the maximum number of residents for a dwelling typically by requiring a minimum square footage for each occupant in a dwelling. Such restrictions differ in substance from zoning definitions of family, which merely define the types of groups permitted in the zoned area.

Historically, the states have played a major role in providing housing and other services to persons with handicaps. Until the 1960s, few non-institutional residential settings were offered by the states — one study found only 40 halfway houses operating in the entire United States in 1960. F. Randolph, P. Ridgeway, C. Sanford, D. Simoneau & P. Carling, *A National Survey of Community Residential Programs for Persons with Prolonged Mental Illness*, Center for Community Change through Housing & Support, Trinity College of Vermont, 6 (1991) ("*National Survey*").

In the decade preceding the enactment of the FHAA, there was a substantial increase in community residential services for persons with mental illness or mental retardation. A national survey found that the number of mental health organizations providing community residential services to persons with psychiatric disabilities increased by 125% in the two years between 1982 and 1984. *National Survey*, at 16. The rate of increase in the number of "beds" during that period was even more dramatic — from 8,515 in 1982 to 24,452 in 1984. *Id.*

Similarly, the number of persons with mental retardation or developmental disabilities in homes with 15 or fewer residents increased from 40,424 in 1977 to 131,161 in 1988. *Growth of Small, Residential Living Programs for the Mentally Retarded and Developmentally Disabled: Hearing before the Subcomm. on Regulation, Business Opportunities, and Technology of the House Comm. on Small Business*, 103d Cong., 1st Sess. 58, 70 (1993) (memo from Subcomm. Staff to Subcomm. Chairman) ("*House Hearing*"). By 1988, the year during which Congress enacted the FHAA, government spending for those same facilities increased from \$879 million in 1977 to \$5.6 billion in 1988, \$4.2 billion of which came from the states. *Id.* at 71.

Today, the states continue to play a major role in providing housing and other services to a wide range of persons with developmental disabilities, mental retardation, mental illness, AIDS/HIV, Alzheimer's disease, and other handicaps. The states provide a continuum of residential settings from supported housing² to community residences to state

² Supported housing programs enable persons with handicaps to live on their own or in another setting of their choice with appropriate services provided as needed. However, not all

institutions. See, e.g., Commonwealth of Massachusetts Executive Office of Health and Human Services, *A Plan for the Development of Community-Based Housing and Programs for the Clients of the Department of Mental Health and Mental Retardation*, 11 (1993) ("EOHHS Report").

The housing programs serving persons with mental retardation in Massachusetts illustrate the continuum of residential services provided by the states. Approximately 3,000 persons reside in group living situations within the community which are staffed twenty-four hours per day. As many as eight persons live in each of these residences with the majority living in homes for four or fewer. Commonwealth of Massachusetts, *Comprehensive Housing Affordability Strategy*, 55 (1993). The homes are located in residential neighborhoods affording the residents access to job opportunities, public transportation, social interaction and community services available to all citizens. Additionally, 1,600 persons live either alone or with another person with mental retardation in supported housing and 2,300 more persons reside in state institutions or schools. *Id.* at 54.

Community residences are a significant component of the continuum of services offered by the states. Nationally, in 1993, 164,353 persons with mental retardation were living in 37,358 community residences of six or fewer residents and 6,360 homes of seven to fifteen residents. T. Mangan, E. Blake, R. Prouty, K. Lakin, *Residential Service for Persons with Mental Retardation and Related Conditions: Status and*

persons with handicaps are appropriate for this type of program.

Trends Through 1993, 42 (1994) ("Status and Trends Through 1993"). The array of services in Wisconsin is illustrative of community residential programs in the various states. It has licensed 857 community residences, each with a capacity of three to eight persons, serving a variety of populations including persons with developmental disabilities, mental illness, and Alzheimer's disease. Residential settings as a whole in Wisconsin provide homes for over 1,500 persons with Alzheimer's disease and more than 2,500 persons with developmental disabilities. Other states provide similar residential services to persons with handicaps.³

³ Utah operates 256 different facilities for persons with mental retardation: 42 community residence homes for seven to eight persons; 22 community residence homes for four to six persons; and 192 supervised apartments for one to three persons. Missouri operates 762 community residence homes for persons with mental retardation or developmental disabilities which provide homes for over 5,100 persons with an average of 6.7 residents per home. Nevada has 12 community residences for persons with Alzheimer's disease and 26 homes for persons with mental retardation. Maryland has licensed 1,008 separate residences for persons with developmental disabilities with an average size of 3.54 persons providing homes for over 3,500 people. In addition, for persons with mental illness in Maryland there are 686 residences providing homes for over 1,800 people in settings averaging less than three persons per home and other community residences for up to eight persons with handicaps which provide homes for another 125 people.

In Massachusetts, the Department of Mental Retardation has residential programs located in 78% of the 351 cities and towns in the Commonwealth. More than 1,800 persons with mental retardation live in homes with four or fewer persons with 24-hour staff support. Another 1,131 persons reside in community

Looking ahead, the states are continuing to create and site new community residences. Massachusetts continues to develop four-person staffed homes for persons with mental retardation. Other states have similar programs: Idaho plans to triple the number of four-person homes it operates for persons with mental retardation; Wisconsin has seen the number of homes licensed for persons with handicaps increase steadily during the past several years — almost 50 homes each year for three to eight persons since 1991. In creating housing for persons with mental retardation, Maryland emphasizes community residences and supported housing. In addition, states operate loan funds under the ADAA, which provide seed money for the creation of new Oxford Houses every year. Thirty such homes are planned over the next three years in Missouri alone. As noted above, federal law requires these homes to have a minimum size of six persons. 42 U.S.C. § 300x-25.

The breadth of the development of community residences is reflected by the steady decline, nationwide, in the average

residences or Intermediate Care Facilities-Mental Retardation serving six to eight persons each. On behalf of persons with mental illness, Massachusetts provides residential services to over 4,600 persons in community residences with average sizes of 8 or less.

In addition, with funds provided pursuant to the Anti-Drug Abuse Act of 1988, 42 U.S.C. § 300x-25, (as amended 1992 "ADAA") most states support Oxford House-type programs for individuals recovering from alcohol or drug abuse, for which Congress has required a minimum of six persons. Missouri, for instance, has 36 such homes and Massachusetts has 14.

number of persons with mental retardation living in each residential setting from 22.5 in 1977 to 5.1 in 1993. *Status and Trends Through 1993*, at 32. Moreover, many more persons would like to avail themselves of these residential treatment services: Massachusetts has 2,066 names on its waiting list for housing for persons with mental retardation; Utah has 767 persons on its waiting list for residential treatment services.

Fiscal constraints and integration into the community are two of the factors motivating the states' development of community residences. Community residences, sometimes, are substantially less expensive than other residential settings, in some cases by as much as \$55,000 per year per person.⁴ In many cases, however, fiscal considerations also constrain states from offering residential settings smaller than three or four persons. For example, for persons with mental retardation requiring 24-hour support and a highly structured environment, as many do, a residential setting for one or two people can be prohibitively expensive because the staff serving one or two persons can also serve another two or three people. The size of the community residences run by the states illustrates this point: the homes for persons with Alzheimer's disease in

⁴ Governor's Special Commission on Consolidation of Health and Human Services Institutional Facilities, *Actions for Quality Care*, 9 (1991). Similarly, a study of costs related to facilities for individuals with mental retardation found substantial savings in the daily expenses for smaller (fifteen persons or less) as compared with larger facilities in ten of fourteen states studied. *Status and Trends Through 1993*, at 10.

Nevada all have room for 6 residents; the average size of homes for persons with developmental disabilities in Maryland is 3.54 persons; Massachusetts prefers to create new homes for no more than 4 persons with existing homes ranging in size up to 8 persons; in Utah the community residences range in size from 4 to 8 persons. Through these community residences, the states have chosen to create homes in the community for persons with mental retardation unable to live independently.

Community residences also provide an effective means for integrating people into the community. They offer one way for the states to offer support services to persons with handicaps while they live in residential neighborhoods which afford them access to the full range of social interactions available to others.

When developing community residences for persons with handicaps, the states strive to create a family-style home in the community. Idaho encourages "residential care facilities serving specific mentally ill and developmentally or physically disabled populations which are small in size to provide for **family and home-like arrangements**." Idaho Code § 39-3304 (emphasis added). Many other states have similar statutes. See, e.g., Utah Code Ann. § 62A-5-102(2)(c) (1988) (promoting "integration into community life" for persons with disabilities); N.C. Gen. Stat. § 168-20 (1981) (describing state policy of providing handicapped persons with "the opportunity to live in a **normal residential environment**") (emphasis added); Ohio Revised Code Ann. § 5123.19(A)(2) (1993) (providing for "a **family setting**" for community residences for persons with mental retardation or developmental disabilities) (emphasis added); Chapter 205, Wisconsin Laws 1977 (providing that "a community living arrangement should be

located in a **residential area** . . . residents of the facilities should be able to live in a manner similar to the other residents of the area") (emphasis added); Health-Gen. Article Ann. Code of MD § 7-102(7) (describing state policy that people with developmental disabilities "live in surroundings as normal as possible"); Alaska Stat. § 47.33.005(1) (1994) (encouraging homes "that provide a **home-like environment** for . . . persons with a mental or physical disability") (emphasis added).

The states' emphasis on a family-like home is illustrated by the community housing Massachusetts continues to develop. For persons with mental retardation, Massachusetts creates a "home [for] those served, rather than a setting for treatment, programming or any other professional activity." *EOHHS Report* at 35. Massachusetts implements this objective in a number of ways. It promotes resident involvement in the location of the home and selection of the staff. *Id.* In addition, the homes are organized so that the residents may live together in a family style — sharing meals, for instance. Similarly, as Massachusetts creates housing for persons with mental illness, it seeks to provide "normal, natural homes integrated into their community surroundings." *EOHHS Report* at 5. Although the average size of these homes may vary from 3 to 8 persons and the level of support services may vary from minimal to intense, the governing regulations in all cases provide for a "family-style" model in a "normal home" environment. 104 C.M.R. § 17.13(4)-(7).

One of the homes developed in Massachusetts is located on a tree-lined street in a family neighborhood in a suburb north of Boston. In the home, six men and women with mental illness, between the ages of 35 and 69, live together as a

family. Like many families, these six people are engaged in their own full or part-time activities outside the home during the day. Again like a family, they share meals, household chores and social activities as they have throughout the two and one-half years they have lived together.

In siting community residences, the states often find that zoning ordinances, including those defining family as Edmonds has done, are invoked in an attempt to exclude a group of persons with handicaps from living in a single-family neighborhood. Unlike the residents of fraternity houses and boarding homes at whom these rules aim, *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1973), however, many of the handicapped persons living in a group home cannot live in a single-family neighborhood except in a community residence, a fact recognized by this Court. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 438, n. 6 (1985) (noting the district court's unchallenged finding that "[g]roup homes currently are the principal community living alternatives for persons who are mentally retarded.") Furthermore, the residents of group homes, in contrast to the residents of a fraternity or boarding house, live together in a manner akin to a family; hence the states endeavor to locate these homes in single-family neighborhoods and integrate the homes into these neighborhoods.⁵

The FHAA protects important rights of individuals with handicaps. Exempting from review under the FHAA the

⁵ In any event, the application of unrelated person rules to those not protected by the FHAA's substantive provisions is not subject to review under the FHAA.

Edmonds ordinance and the similar ordinances of other municipalities would impair the efforts of state agencies to develop community residences and cause the exemption in 42 U.S.C. § 3607(b)(1) to eviscerate the statute as applied to community residences. *Amici* therefore urge this Court to affirm the decision below.

Summary of Argument

The Edmonds ordinance defining "Family" falls outside of the plain meaning of the FHAA exemption for "any reasonable local, State, or Federal restriction regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. § 3607(b)(1). The legislative history of the FHAA confirms this plain meaning of § 3607(b)(1), and any other result would defeat the purpose of the Act. Accordingly, the decision below should be affirmed.

1. Efforts to construe § 3607(b)(1) should begin with the plain and unambiguous language of the exemption. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). By using the terms "the maximum number" of occupants in "a dwelling," § 3607(b)(1) exempts only restrictions identifying the highest or greatest number of persons who may reside in a particular dwelling. Use of the word "the" indicates further that there can be one, and only one, such maximum per dwelling. The Edmonds ordinance has an entirely different purpose; it defines, with reference to the term "Family," the types of groups that may reside in a single-family district.

This definition of family authorizes an unlimited number of related individuals to occupy "a dwelling." It imposes no

numerical limitation whatsoever and certainly not "the maximum" restriction on the number of occupants per "dwelling." The five-person rule for unrelated persons included within Edmonds' definition of family, moreover, always can be exceeded by the unlimited number of related persons permitted in a dwelling. The Edmonds ordinance thus does not qualify as a restriction on "the maximum number" of occupants permitted in "a dwelling."

In addition, the Edmonds definition of family plainly limits not the "number" of occupants per "dwelling" but the types of groups defined as a family and the types of uses permitted in the area zoned. See *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 498 (1977) (stating zoning definitions of family "impose limits on **types of groups** that could occupy a dwelling unit"). Another type of rule, on the other hand — public health regulations limiting the number of occupants in relation to the per square feet of floor space — has been recognized as restricting the maximum number of occupants per dwelling. See *Moore*, 431 U.S. at 500 n. 7; *id.* at 520 n. 16 (Stevens, J. concurring). Such per-square-footage requirements are included in several model housing codes, including that promulgated in 1986 by the American Public Health Association and Center for Disease Control, which uses language strikingly similar to the plain language of the exemption. E. Mood, *American Public Health Ass'n - Centers for Disease Control, Recommended Minimum Housing Standards* (1986) ("APHA-CDC"). Compare § 3607(b)(1) (exempting restrictions regarding "the maximum number of occupants permitted to occupy a dwelling") with § 2.51 of the APHA-CDC code (defining "[p]ermissible occupancy" as "the

maximum number of individuals permitted to reside in a dwelling unit . . . "). In using the phrase "the maximum number" of occupants per "dwelling," therefore, Congress meant to exempt and did exempt restrictions like the per-square-footage requirements, but not zoning definitions of "Family" like the Edmonds ordinance.

2. Although the plain meaning of § 3607(b)(1) is clear, insofar as there is any ambiguity, consulting the legislative history is appropriate, *Garcia v. United States*, 469 U.S. 70, 75 (1984), and here confirms the plain meaning. The legislative history makes clear that Congress intended to subject to review under the FHAA not only rules imposing requirements on persons with handicaps without imposing them on others, but also otherwise neutral rules and regulations, such as the Edmonds' ordinance, that make housing unavailable to individuals with handicaps. Moreover, the legislative history of § 3607(b)(1) in particular explains that restrictions upon occupancy fall within the exemption only when they apply to all occupants. The five-person rule in the Edmonds' ordinance applies only to unrelated occupants, and thus falls outside the scope of § 3607(b)(1).

3. The purpose of the Fair Housing Act also supports the plain meaning of § 3607(b)(1). The language of the Fair Housing Act is "broad and inclusive," *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972). Because it is a remedial statute, its exemptions should be construed narrowly. The FHAA makes it "unlawful . . . to discriminate [on the basis of handicap] . . . or to **otherwise make [housing] unavailable**," a term of art with broad application. 42 U.S.C. § 3604(f)(1) (emphasis added).

Shielding the Edmonds ordinance and similar zoning definitions of family, as a matter of law, from any review on the merits under the FHAA would defeat the goal of having the Act's substantive provisions apply to otherwise neutral zoning policies and practices which make housing unavailable on the basis of handicap.

Argument

I. THE PLAIN LANGUAGE OF SECTION 3607(B)(1) DEMONSTRATES THAT ZONING DEFINITIONS OF "FAMILY" ARE NOT EXEMPTED FROM THE FAIR HOUSING AMENDMENTS ACT OF 1988.

The narrow issue decided below by the district court and the court of appeals was whether, pursuant to 42 U.S.C. § 3607(b)(1), the Edmonds zoning ordinance defining "Family" for purposes of its single-family zone is exempt from the substantive provisions of the Fair Housing Amendments Act of 1988. *City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802, 803 (9CA 1994).⁶ Under § 3607(b)(1), "reasonable local, State, or Federal restrictions

⁶ Contrary to the argument in petitioner's brief at 11, a holding affirming the decision below will not "overturn Euclidian zoning and thereby the definition of family" upheld in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1973). The court of appeals expressly declined to consider the merits of whether the ordinance violates the FHAA. *City of Edmonds*, 18 F.3d at 807. The court of appeals thus reversed and remanded the case to the district court for further findings. *Id.*

regarding the maximum number of occupants permitted to occupy a dwelling" are exempt from review under the FHAA. Consideration of whether the Edmonds definition of "Family" is an occupancy restriction within the scope of 42 U.S.C. § 3607(b)(1) must begin with the plain meaning of the exemption. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

By its terms, § 3607(b)(1) exempts only those restrictions which identify the highest or greatest number of persons who may reside in "a dwelling" (i.e. "the maximum" number of occupants per "dwelling") and which are otherwise reasonable. The Edmonds ordinance has an entirely different purpose; it defines, with reference to the term "Family," who may reside in a single family district and is therefore clearly outside the exemption. As discussed below, when Congress enacted § 3607(b)(1), it did not exempt zoning regulations generally. Rather, it exempted rules designed to protect the public health by preventing overcrowding in a dwelling, such as per-square-footage requirements, which often mirror the plain language of § 3607(b)(1).⁷

⁷ Compare Section 3607(b)(1) (exempting restrictions regarding "the maximum number of occupants permitted to occupy a dwelling") with the model housing code of the American Public Health Association and Center for Disease Control which defines "[p]ermissible occupancy" to mean "the maximum number of individuals permitted to reside in a dwelling unit"

A. *Edmonds' Definition of Family Does Not Restrict "the Maximum Number" of Occupants Per "Dwelling."*

The only permitted primary uses in single-family residential zones in Edmonds are "single-family dwelling units." Edmonds Community Development Code ("ECDC") § 16.20.010(A)(1). A "single-family dwelling unit" is a "detached building used by one family, limited to one per lot." ECDC § 21.90.080. The ordinance at issue in this case is the section of the Edmonds Community Development Code which defines the term "Family:"

Family means an individual or two or more persons related by genetics, adoption, or marriage or a group of five or fewer persons who are not related by genetics, adoption, or marriage

ECDC § 21.30.010. Petitioners contend that this provision is within the exemption as imposing "a limit" on occupancy because it effectively precludes more than five unrelated persons from residing together in a single-family district. Petitioner's Brief at 11, 12, 14, 15.⁸ However, the plain language of § 3607(b)(1) defines a far narrower exemption than would reach the Edmonds ordinance.

By its terms, § 3607(b)(1) exempts only restrictions which

⁸ As set forth in section I(B) *infra*, the definition of family in the Edmonds ordinance does not directly restrict the number of occupants permitted in a dwelling, it merely describes the types of groups permitted to reside in the single-family zone.

establish a single maximum number of occupants permitted to occupy a dwelling. "Maximum" is defined as the "greatest in quantity or highest in degree attainable or attained." Webster's 3rd New International Dictionary 1396 (unabridged) (1961). Significantly, "maximum" is preceded in § 3607(b)(1) by "the," which is "used as a function word to indicate that a following noun or noun equivalent refers to someone or something that is unique or is thought of as unique or exists as only one at a time." *Id.* at 2368. Thus, in § 3607(b)(1), "the maximum number" refers to one, and only one, "highest" or "greatest" number of occupants permitted to occupy a particular dwelling.

ECDC § 21.30.010 clearly is not such an occupancy restriction. It merely defines "Family" in the "normal and customary meaning[]" of the term, ECDC § 21.00.000, primarily as an **unlimited** number of related persons who occupy a dwelling, or a modest number (here, five) of individuals who are not related and are not wards of the state. With regard to related persons, the Edmonds ordinance imposes no limitation whatsoever on the number of persons who may occupy a dwelling in a single-family district.

Moreover, ECDC § 21.30.010 does not restrict "the maximum number" for "a dwelling" merely because it imposes a limit on a subgroup of occupants permitted to reside in the single-family zone — those who are not related and are not wards of the state. This purported "limit" on unrelated persons may be and often is less than the total number of related persons who occupy a dwelling in the single-family zone. Petitioner's brief illustrates how it is the per-square-footage requirement in the Uniform Housing Code ("UHC"), and not ECDC § 21.30.010, which establishes "the maximum number"

for "a dwelling:"

For example, assume a single-family house in Edmonds has square footage that would allow a total of **eight** adults under the UHC. Any number of related family members could reside there, up to eight. If a family decided to let rooms, a permitted use, the total number of residents would again be limited to **five**.

Petitioner's Brief at 14 (citation omitted and emphasis added). In Petitioner's example, the five-person limit for unrelated persons obviously is not "the maximum number" of persons permitted to occupy "a dwelling" in an Edmonds single-family zoning district. At most, the Edmonds ordinance may impose a limitation on certain types of people under certain circumstances, which can be exceeded by other limitations on other types of people under other circumstances. Such a purported "limit" certainly does not qualify as "the maximum number" of occupants permitted for "a dwelling" under § 3607(b)(1).⁹

⁹ For the same reasons, there is no merit to the argument that Edmonds' definition of family falls within § 3607(b)(1) because it speaks in terms of "any" restrictions "regarding" maximum occupancy. The potential breadth of the terms "any" and "regarding" does not change the plain language of the unique and limiting phrase they modify, "the maximum number" — i.e., the section applies **only** to "any restrictions regarding the **maximum** number" of occupants in "a dwelling."

B. The Edmonds Ordinance Regulates The Character of the Area Zoned But Does Not Restrict the Maximum Number of Occupants Within a Dwelling.

Edmonds' definition of "Family" in § 21.30.010 falls within Title 21.00 of the ECDC, entitled "DEFINITIONS — GENERAL." Section 21.30.010 merely states that "Family" means either: (1) an individual, (2) an unlimited number of related individuals, or (3) five or fewer unrelated individuals. This definition becomes a "restriction" only indirectly, because the word "Family" is used in ECDC chapter 16.20, entitled "*RS - SINGLE-FAMILY RESIDENTIAL*," which lists under the heading "Permitted Primary Uses" "1. Single-family dwelling units." ECDC § 16.20.010(A). The five-person figure described by the Petitioner as an occupancy limit is simply part of a description of one of three categories of occupants that falls within the definition of "Family". This section thus merely lists the different types of groups or "uses" permitted within the single-family zone. See Petitioner's Brief at 9.

This same characterization of the definition of family for purposes of single-family zoning was recognized in *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 498 (1977).¹⁰

¹⁰ Although *Moore* is cited in *Elliott v. City of Athens*, 960 F.2d 975 (11CA), cert. denied, 113 S. Ct. 376 (1992), for its statement regarding the "sanctity of marriage" in constitutional analysis, *Moore* is more relevant to the analysis here under the FHAA for its discussion of the distinction between zoning definitions of family and per-square-footage restrictions. The plain meaning arguments to which this aspect of *Moore* relates were never addressed in *Elliott*, which was decided on the basis of legislative history. 960 F.2d at 979-80.

The Court's analysis began with the recognition that a definition of family for single-family zoning purposes, such as that in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), merely "imposed limits on the types of groups that could occupy a dwelling unit." *Moore*, at 498. The Court went on to reject East Cleveland's attempt to justify its strict definition of family for zoning purposes, *inter alia*, "as a means of preventing overcrowding." *Id.* at 500. Similarly, in his concurrence, Justice Stevens recognized that "restricting the composition of a household is . . . not reasonably related" to "prevention of overcrowding in residences." *Id.* at 520, n. 16 (citations omitted).

The definition of "Family" in ECDC § 21.30.010 is similarly unrelated to limiting the number of occupants per dwelling in single-family districts. The expressed purposes underlying Edmonds' residential zoning rules make no mention of attempting to limit "the maximum number" of occupants within "a dwelling." Rather the zoning ordinance aims:

- A. To reserve and regulate **areas** primarily for **family living** in single-family dwellings.
- B. To provide for additional non-residential **uses** which complement and are compatible with single-family dwelling use.

ECDC § 16.20.000 ("Purposes") (emphasis added). This zoning provision therefore, as Petitioner concedes, is like other zoning provisions — designed to restrict an "area" or neighborhood to those groups or "uses" defined as "family living." See Petitioner's Brief at 9-11.

ECDC § 21.30.010 thus resembles the zoning ordinances

in *Village of Belle Terre* and *Village of Euclid, Ohio v. Ambler Realty*, 272 U.S. 365 (1926), which "classi[fied] land use in a given area into . . . categories." *Village of Belle Terre*, 416 U.S. at 3 (emphasis added). An example of a "restricted-use ordinance," *Id.* at 3-4, Edmonds' definition of family, like that in *Belle Terre*, "has restricted **land** use to one-family dwellings." *Id.* at 2 (emphasis added). While *Belle Terre* established that such a zoning definition of family would survive rational basis scrutiny under the Fourteenth Amendment, it also illuminated the nature of such an ordinance as "a **land** use project addressed to family needs." *Id.* at 9 (emphasis added). Rather than regulating conditions within dwellings, such zoning ordinances "lay out **zones** where family values, youth values, and the blessings of quiet seclusion and clean air make the **area** a sanctuary for people." *Id.* (emphasis added); *cf.* *Village of Euclid, Ohio*, 272 U.S. at 388 (characterizing zoning as "power . . . to forbid the erection of a building of a particular kind or for a particular use").

A definition of family that restricts the types of uses permitted in the area zoned does not regard "the maximum number" of occupants permitted within each "dwelling" in the area. Edmonds' definition of family for this reason also falls outside the plain meaning of § 3607(b)(1).

C. Square Footage Requirements, at the Local, State, and Federal Level, Are Commonly Understood to Define the Maximum Number of Individuals Permitted to Reside in a Dwelling Unit.

Another type of regulation, also widely enacted, does define "the maximum number" of occupants permitted in "a dwelling:" public health regulations requiring a minimum amount of floor space for each occupant of a dwelling. Edmonds has such a rule, as do many other jurisdictions; the Center for Disease Control has promulgated a model statute whose language § 3607(b)(1) follows in large part; and the Court has recognized that these rules establish "the maximum number" of occupants for "a dwelling."

As noted above, the City of Edmonds incorporated into its code the per-square-footage requirement of the Uniform Housing Code which requires a minimum amount of floor space for each occupant of a dwelling. ECDC § 19.10.000. This approach to restricting the maximum number of occupants permitted in a dwelling has been followed at the local, State, and Federal level.¹¹

¹¹ The Court recognized East Cleveland's square footage restriction. *Moore*, 431 U.S. at 500 n. 7. Massachusetts requires a minimum of 150 square feet of floor space for the first occupant and at least 100 square feet for each additional occupant. 105 C.M.R. § 400.015. Rhode Island requires a minimum of 150 square feet for the first occupant and at least 130 square feet for each additional occupant. Rhode Island General Laws § 45-24.3-11 (1956). California, like the City of Edmonds, has adopted the UHC which establishes minimum square footage requirements based upon the number of

Per-square-footage requirements restrict the number of occupants per dwelling in a "common manner" that has been recognized by this Court — that is, in relation to the square footage of inhabitable space within the dwelling. *Moore v. East Cleveland*, 431 U.S. 494, 500 n. 7 (1977); *id.* at 520 n. 16. (Stevens, J., concurring in judgment). In fact, the Court recognized that square footage requirements establish "the maximum permissible occupancy of a dwelling." *Id.* (emphasis added); *see also id.* at 520 n. 16 (Stevens, J. concurring in judgment) (stating communities can prevent "overcrowding" by limiting the number of occupants "in relation to the available floor space") ; *cf. City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. at 450 (1985) (observing that per-square-footage requirement addresses overcrowding). Moreover, the American Public Health Association and Center for Disease Control ("APHA-CDC") 1986 model housing code, § 2.51, defines "[p]ermissible occupancy" in a manner strikingly parallel to § 3607(b)(1) as "the maximum number of individuals permitted to reside in a dwelling unit . . ." and recommends specific square footage minimums.¹² *See* 42 U.S.C. § 3607(b)(1) ("the maximum

occupants. West's Ann. Cal. Health and Safety Code § 17922(a)(1). At the federal level, the Department of Housing and Urban Development ("HUD") has adopted similar dwelling overcrowding restrictions for the property it owns and funds. 24 C.F.R. § 100.10 (1994).

¹² As early as 1953, a Presidential Commission recognized the predecessor to the APHA-CDC standards, promulgated only by the APHA. 1953 United States President's Advisory

number of occupants permitted to occupy a dwelling").¹³

Square footage requirements, such as those promulgated by APHA-CDC, aim to reduce public health risks that typically accompany overcrowding, such as the increased probability of (1) transmission of infectious diseases (tuberculosis, skin diseases, and certain digestive system diseases); (2) stress on plumbing, washroom and bathing facilities that could heighten risk of transmission of disease; (3) home accidents and fire hazards; (4) problems in social development and social relationships among occupants; and (5) other psychological, physiological, and sociological injuries. *See, e.g., Nolden v. East Cleveland City Comm'n*, 12 Ohio Misc. 205, 210-211, 232 N.E.2d 421, 425-26 (1966). The importance of these public health regulations explains Congress' decision to exempt them from the FHAA in § 3607(b)(1).

Since long before the passage of the FHAA in 1988, therefore, square footage requirements at the local, State and Federal level have been commonly understood to define "the

Committee on Government Housing (Dec. 1953), Ex. 5 entitled "Analysis of Space Occupancy Standards for Dwellings as Provided in Regulations of Certain Localities and States."

For the full text of § 9.02 of the APHA-CDC standards, see Appendix attached hereto.

¹³ In enacting § 3607(b)(1), therefore, Congress would be presumed to be knowledgeable about the existing "local, State, or Federal" maximum occupancy restrictions described in the text, this Court's discussion of such restrictions and the model code promulgated by the Center for Disease Control. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988).

maximum number" of individuals permitted to reside in "a dwelling unit." In using the phrase "reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling," therefore, Congress meant to exempt, and did exempt in § 3607(b)(1), only restrictions that establish the maximum number of occupants for a particular dwelling, square footage requirements for example, and **not** zoning restrictions regulating the character of or uses permitted in an area.¹⁴

II. THE LEGISLATIVE HISTORY OF THE FHAA MAKES CLEAR THAT CONGRESS DID NOT INTEND TO EXCLUDE FROM REVIEW LAND-USE POLICIES AND PRACTICES THAT MAY HAVE THE EFFECT OF MAKING HOUSING UNAVAILABLE TO PERSONS WITH HANDICAPS.

As the legislative history of the FHAA makes explicit,¹⁵ a fundamental purpose of the Act was "to end the unnecessary exclusion of persons with handicaps from the American mainstream." H.R. Rep. No. 711, 100th Cong., 1st Sess. 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179 ("House

¹⁴ Accordingly, the Court need not decide whether the Edmonds ordinance is "reasonable" under § 3607(b)(1).

¹⁵ *Amici* contend that the plain meaning of § 3607(b)(1) is clear as set forth *supra*. However, to the extent there is any ambiguity, this Court may look to the legislative history as "an additional tool of analysis." *Garcia v. United States*, 469 U.S. 70, 75 (1984).

Report"). Congress understood the importance of "prohibiting discrimination against individuals with handicaps [as] a major step in changing the stereotypes that have served to exclude them from American life." *Id.* Recognizing that "[t]he right to be free from housing discrimination is essential to the goal of independent living," *id.*, the legislation "clearly prohibits the use of stereotypes and prejudice to deny critically needed housing to handicapped persons." *Id.*

As a result of "prejudice and aversion," individuals with handicaps have experienced housing discrimination. *Id.* In the specific context of "congregate living arrangements for persons with handicaps," *id.* at 23, Congress understood that the "authority to . . . regulate use of land has sometimes been used to restrict the ability of individuals with handicaps to live in communities." *Id.* at 24. Congress intended the substantive provisions of the FHAA to apply to "state or local land-use practices or decisions which discriminate against individuals with handicaps," *id.* and, specifically, "intend[ed] that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices." *Id.*

As the legislative history makes clear, Congress appreciated the fact that housing is "made unavailable" in a number of ways. While Congress was concerned about instances where discrimination results from "the enactment or imposition of land use requirements on congregate living arrangements among non-related persons with disabilities . . . [that] are not imposed on families and groups of similar size of other unrelated persons," *id.*, its concern and the scope of the statute were broader. As the legislative history explicitly states, Congress was specifically aware of the fact that "[a]nother

method of making housing unavailable to people with disabilities has been the application or enforcement of otherwise neutral rules and regulations . . . on land use in a manner which discriminates against people with disabilities." *Id.* (emphasis added) (footnote omitted). Housing made unavailable through "[t]hese and similar practices would [also] be prohibited." *Id.*

The legislative history also confirms that the exemption of § 3607 was not meant to remove zoning restrictions on unrelated persons from the reach of the FHAA. As the House Report states, reasonable limitations by governments, such as limits on "the number of occupants per unit based on a minimum number of square feet in the unit" may "continue, as long as they were **applied to all occupants.**" *House Report* at 31 (emphasis added). In order for a numerical restriction on occupancy to fall within the purview of § 3607, it must apply to all occupants. Indisputably, the five-person rule in the Edmonds ordinance does not so apply, and thus does not qualify for the exemption in § 3607(b)(1).

III. INTERPRETING SECTION 3607(B)(1) TO APPLY TO ZONING DEFINITIONS OF FAMILY, SUCH AS THE EDMONDS ORDINANCE, WOULD BE INCONSISTENT WITH THE PURPOSE OF THE FHAA.

Although "the starting point for interpreting any statute is the language of the statute itself," *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980), the Court cannot interpret a statute in a manner that directly conflicts with the overall purpose and goals which Congress

intended it to serve. *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968). This is particularly true where the Court interprets remedial statutes, such as the Fair Housing Act, liberally to accomplish their goal. *Peyton v. Rowe*, 391 U.S. 54, 65 (1968). This Court has held that the language of the Fair Housing Act is "broad and inclusive," *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972), and should be construed generously to ensure the prompt and effective elimination of discrimination in housing. *Id.* at 211-212. Similarly, the Court has noted that "any exemptions from . . . remedial legislation must therefore be narrowly construed," *A.H. Phillips, Inc., v. Walling*, 324 U.S. 490, 493 (1945), cited with approval in *Commissioner of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989).

In the 1988 amendments to the Fair Housing Act, Congress added a new prohibition against housing discrimination on the basis of handicap, making it "unlawful . . . to discriminate . . . or to otherwise make unavailable" housing based upon handicap. 42 U.S.C. § 3604(f)(1) (emphasis added). The key phrase, "otherwise make unavailable" is a well-established term of art in the context of federal fair housing legislation, which the courts have historically applied to a wide range of conduct to prohibit "all practices which have the effect of denying dwellings on prohibited grounds," *United States v. American Institute of Real Estate Appraisers*, 442 F. Supp. 1072, 1079 (N.D. Ill. 1977); including, for example, racially exclusionary land-use practices by a municipality, *United States v. Black Jack, Missouri*, 508 F.2d 1179, 1184 (8CA 1974), cert. denied, 422 U.S. 1042 (1975); racial "steering," *United States v. Mitchell*, 580 F.2d 789, 791 (5CA 1978); and "redlining"

by financial institutions, *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 493 (S.D. Ohio 1976). "[I]n the absence of a contrary indication, this Court assumes that when a statute uses terms of art, Congress intended it to have its established meaning." *McDermott International v. Wilander*, 498 U.S. 337, 342 (1991).

As an exemption to a broad remedial statute, § 3607 should be interpreted narrowly and certainly no more broadly than necessary to address its plain purpose and language. Accordingly, assuming *arguendo*, that there is ambiguity in the plain meaning of the section, it is the narrower interpretation of the exemption which limits its effect on the Act's broad substantive non-discrimination provisions, that must prevail.

What Congress understood in 1988 to be true about the critical need to redress land-use policies and practices which have a discriminatory effect on individuals with handicaps is just as true in 1995. In their efforts to develop and establish such residences as part of their continuum of housing opportunities in the community, the states continue to encounter barriers that result from the application or enforcement of neutral zoning rules and regulations.

Consistent with the clear congressional pronouncement to address housing discrimination against persons with handicaps and to remove those barriers resulting from "zoning decisions and practices . . . that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community," *House Report* at 24, the states have continued to move forward with their efforts to establish community housing. The FHAA is an important safeguard against discriminatory interference with those efforts. Construing the § 3607 exemption broadly to encompass zoning definitions of

family thus would directly conflict with the overall purpose and goals which Congress intended the FHAA to serve, *FTC v. Fred Meyer, Inc.*, 390 U.S. at 349, and would negate its general purposes. *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 419-420 (1973). In addition, such a broad construction would deprive the states of an important tool for addressing barriers to the establishment of community living opportunities for their citizens with handicaps.

Conclusion

For the foregoing reasons, this Court should affirm the decision of the United States Court of Appeals for the Ninth Circuit.

SCOTT HARSHBARGER

*Attorney General
of Massachusetts*

STANLEY J. EICHNER*

DONNA L. PALERMINO

LEO T. SOROKIN

Assistant Attorneys General

1 Ashburton Place, Room 2019

Boston, Massachusetts 02108

(617) 727-2200

**Counsel of Record*

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Appendix

Section 9.02 of the APHA-CDC model housing code states as follows:

9.02.01 For the first occupant there shall be at least one hundred fifty (150) square feet of floor space and there shall be at least one hundred (100) square feet of floor space for every additional occupant thereof. Floor space is to be calculated on the basis of total habitable room area.

9.02.02 In every dwelling and dwelling unit of two (2) or more rooms, every room occupied for sleeping purposes by one occupant shall contain at least seventy (70) square feet of floor space and every room occupied for sleeping purposes by more than one occupant shall contain at least (50) square feet of floor space for each occupant thereof.

DARRELL V. MCGRAW, JR.
*Attorney General
of West Virginia*

ROSALIE SIMMONDS BALLANTINE
*Attorney General of the
Virgin Islands*

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